

Comments

The Business Opportunity Purchasers Protection Act: The Unfulfilled Promise to Ohio Franchisees

On October 25, 1979, the Business Opportunity Purchasers Protection Act¹ became effective in Ohio. The original Bill had been introduced in the Ohio Senate with the promise that it would "require material disclosures in business opportunity plan sales and provide safeguards for consumer investors."² This Comment will determine whether the Act lives up to its billing. In so doing, this Comment will examine the scope of the Act by analyzing and comparing the Act's definition of "business opportunity plan" with the definition of "franchise" contained in the Federal Trade Commission's new franchise disclosure rule.³ This Comment will also examine the Act's exemptions and remedies. Finally, after concluding that the Act inadequately provides for the needs of purchasers of franchises, recommendations will be made for improving the Act.

I. HISTORY OF FRANCHISE DISCLOSURE LAWS

Ohio is not the first state to enact legislation aimed at requiring sellers to make material disclosures prior to the sale of franchises. California's Franchise Investment Law,⁴ the first of its kind, became effective on January 1, 1971.⁵ Many states have since passed statutes regulating franchises.⁶ These statutes generally require "registration and detailed disclosure of the material terms and conditions of the franchise agreement and any ancillary agreements, and detailed information about the franchisor before the franchisor may either accept any consideration from the prospective franchisee or execute a binding franchise or other agreement."⁷

Ohio's approach to a franchise disclosure law, however, has followed the FTC's approach more than it has followed the franchise disclosure

1. OHIO REV. CODE ANN. §§ 1334.01-.99 (Page Supp. 1980). Section 2 of Amended Substitute Senate Bill 37 provides: "Section 1334.01 to 1334.15 of the Revised Code shall be known as 'The Business Opportunity Purchasers Protection Act.'" 1979 LAWS OF OHIO 5-138 (Baldwin).

2. S. 37, 113th Gen. Assembly (1979) (Preamble).

3. Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436 (1979).

4. CAL. CORP. CODE §§ 31000-31516 (West 1977).

5. "The first state to enact franchising disclosure legislation was California, in 1970." OHIO LEGISLATIVE SERV. COMM'N., FRANCHISING: ALLEGED ABUSES AND POSSIBLE STATE REMEDIES 10 (Staff Research Report No. 111, 1974).

6. See [1978] STATE BUSINESS FRANCHISE DISCLOSURE AND RELATIONSHIP LAWS (CCH).

7. Fern, *The Overbroad Scope of Franchise Regulations: A Definitional Dilemma*, 34 BUS. LAW. 1387, 1387-88 (1979). See G. GLICKMAN, FRANCHISING § 803 (15 BUS. ORGANIZATIONS 1977).

schemes of the various states. On November 11, 1971, the FTC published its Original Proposed Rule,⁸ requested comments, and announced that a public hearing on the proposed Rule would be held during the following February. Two months later, House Bill 1035 was introduced in the Ohio House of Representatives, proposing "to require disclosure of information by a franchisor before execution of a franchise agreement, and to provide relief for nondisclosure or misrepresentation of such information."⁹ Although the Bill was never adopted, it probably was the impetus for the adoption of a motion by the Ohio Legislative Service Commission that a thorough study be made of the franchising industry in Ohio and the actions taken by other state and federal authorities in dealing with franchise abuses and associated frauds.¹⁰ The resulting report outlined a definite need for pre-sale disclosures like those required by the California statute and the FTC's Original Proposed Rule.¹¹ In August of 1974, the FTC's Revised Proposed Rule was released.¹²

The FTC issued the Final Trade Regulation Rule on December 21, 1978.¹³ At the same time, it published both a Statement of Basis and Purpose,¹⁴ and the Proposed Guides for the Rule.¹⁵ A Bill similar in many respects to the Rule was introduced in the Ohio Senate on February 7, 1979.¹⁶ The evidence indicates that the FTC Rule was the archetype for the Ohio Senate Bill.¹⁷ In light of this relationship between the FTC Rule, the

8. Disclosure Requirements and Prohibition Concerning Franchising, 36 Fed. Reg. 21,607 (1971) [hereinafter cited as Original Proposed Rule].

9. H.R. 1035, 109th Gen. Assembly (1972).

10. OHIO LEGISLATIVE SERV. COMM'N, *supra* note 5 (Preface).

11. The report states:

Most precontractual abuses involve information presented to the prospective franchisee. These abuses include failure to inform as well as presentation of incomplete, false, or deceptive information. Other alleged precontractual abuses include promoting the sale of franchises through a public figure who has invested little time or money in the company; using high pressure sales tactics to close the sale of a franchise; and requiring a nonrefundable deposit before permitting the prospective franchisee ever to see the franchise contact.

OHIO LEGISLATIVE SERV. COMM'N, *supra* note 5, at 7. The report also states, "studies of information franchisors provide to prospective franchisees reveal that much promotional literature includes misleading estimates of potential profits and sales." *Id.*

12. Disclosure Requirements and Prohibitions Concerning Franchising, 39 Fed. Reg. 30,360 (1974) [hereinafter cited as Revised Proposed Rule].

13. 16 C.F.R. § 436 (1979) was originally published at 43 Fed. Reg. 59,614 (1978). The proposed effective date for the Rule was July 21, 1979, but its effective date was postponed to allow franchisees to have the benefit of final interpretive guides well in advance of the Rule's effective date. 44 Fed. Reg. 31,170 (1979). For a general discussion of the Rule's provisions, see Goldberg, *Federal Regulation of Franchises: The Federal Trade Commission Rule*, 59 CHI. B. REC. 338 (1978).

14. Statement of Basis and Purpose Relating to Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59,621 (1978) [hereinafter cited as Statement of Basis and Purpose].

15. Proposed Guides to the Franchising and Business Opportunity Ventures Trade Regulations Rule, 43 Fed. Reg. 59,733 (1978) [hereinafter cited as Proposed Guides]. The FTC has since issued Final Guides to the Franchising and Business Opportunity Ventures Trade Regulation Rule, 44 Fed. Reg. 49,966 (1979) [hereinafter cited as Final Guides].

16. S. 37, 113th Gen. Assembly (1979).

17. The strongest evidence that the Bill was drafted from the Rule is the similarity of various portions of each. A number of these will be discussed throughout this Comment. Additionally, the Bill

Ohio Senate Bill, and the Ohio Act, it is possible to gain some insight into the Ohio Act by examining it in light of the FTC Rule, the Statement of Basis and Purpose, and the Proposed Guides.

II. SCOPE OF THE OHIO ACT

A. *Business Opportunity Plan*

1. *Definition of Business Opportunity Plan*

Not surprisingly, the Business Opportunity Purchasers Protection Act is only applicable to sales and leases of business opportunity plans.¹⁸ "Business opportunity plan" is defined in section 1334.01(D) of the Ohio Revised Code as follows:

"Business opportunity plan" means an agreement in which a purchaser obtains the right to offer, sell, or distribute goods or services under all of the following conditions:

- 1) the goods or services are supplied by the seller, a third person with whom the purchaser is required or advised to do business by the seller, or an affiliated person;
- 2) the purchaser is required to make an initial payment greater than one hundred dollars, but less than fifty thousand dollars, to the seller or an affiliated person to begin or maintain the business opportunity plan;
- 3) the seller makes any of the following representations:
 - a) that the purchaser will be provided with retail outlets or accounts, or assistance in establishing retail outlets or accounts for the sale or distribution of the goods or services;
 - b) that the purchaser will be provided locations or assistance in finding locations for vending machines, electronic games, rack displays, or any other equipment or display for use in the sale or distribution of the goods or services;
 - c) that the purchaser can earn a profit in excess of the initial payment;
 - d) that there is a market for the goods or services;
 - e) that there is as buy-back arrangement.¹⁹

In determining the types of business arrangements that were intended to be included under the Ohio Act's definition, it is helpful to examine and

was introduced shortly after the Rule and there were two cross references from the Ohio Bill to the FTC Rule. Section 1334.12(J) of the Bill exempted "A fractional franchise as defined by 16 C.F.R. § 436.2(h)." Section 1334.13 of the Bill granted an exemption "to any transaction which fully complies with the requirements of 16 C.F.R. § 436.1 et seq." S. 37, 113th Gen. Assembly (1979).

18. The section of the Act that requires sellers of business opportunity plans to give their purchasers disclosure statements, OHIO REV. CODE ANN. § 1334.02 (Page Supp. 1980), and the section that lists the Act's prohibitions, OHIO REV. CODE ANN. § 1334.03 (Page Supp. 1980), both begin, "In connection with the sale or lease of a business opportunity plan. . . ."

19. OHIO REV. CODE ANN. § 1334.01(D) (Page Supp. 1980). "Purchaser" is defined in the Act as "a person to whom a business opportunity plan is sold or leased." OHIO REV. CODE ANN. § 1334.01(B) (Page Supp. 1980). "Seller" is defined in the Act as "a person who sells or leases a business opportunity plan." OHIO REV. CODE ANN. § 1334.01(A) (Page Supp. 1980).

compare it with the definition of "franchise" in the FTC Rule²⁰ and the definition of "business opportunity plan" in the Ohio Bill.²¹

2. *The FTC Types of Franchises and the Ohio Act*

The definition of franchise in the FTC Rule is essentially made up of two parts, covering three different business operation or marketing methods. Those franchises that qualify under the first portion of the

20. "Franchise" is defined in the FTC Rule as follows:

The term "franchise" means any continuing commercial relationship created by any arrangement or arrangements whereby:

(1)(i)(A) a person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

(1) Identified by a trademark, service mark, trade name, advertising or other commercial symbol designating another person (hereinafter "franchisor"); or

(2) Indirectly or directly required or advised to meet the quality standards prescribed by another person (hereinafter "franchisor") where the franchisee operates under a name using the trademark, service mark, trade name, advertising or other commercial symbol designating the franchisor; and

(B)(1) The franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan or business affairs; or

(2) The franchisor gives significant assistance to the franchisee in the latter's method of operation, including, but not limited to, the franchisee's business organization, management, marketing plan, promotional activities, or business affairs; *Provided, however*, that assistance in the franchisee's promotional activities shall not, in the absence of assistance in other areas of the franchisee's method of operation, constitute significant assistance; or

(ii)(A) A person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

(1) Supplied by another person (hereinafter "franchisor"), or

(2) Supplied by a third person (e.g. a supplier) with whom the franchisee is directly or indirectly required to do business by another person, (hereinafter "franchisor"); or

(3) Supplied by a third person (e.g. a supplier) with whom the franchisee is directly or indirectly advised to do business by another person (hereinafter "franchisor") where such third person is affiliated with the franchisor; and

(B) The franchisor:

(1) Secures for the franchisee retail outlets or accounts for said goods, commodities, or services; or

(2) Secures for the franchisee locations or sites for vending machines, rack displays, or any other product sales display used by the franchisee in the offering, sale, or distribution of said goods, commodities, or services; or

(3) Provides to the franchisee the services of a person able to secure the retail outlets, accounts, sites or locations referred to in paragraph (a)(1)(ii)(B)(1) and (2) above; and

(2) The franchisee is required as a condition of obtaining or commencing the franchise operation to make a payment or a commitment to pay to the franchisor, or to a person affiliated with the franchisor.

16 C.F.R. § 436.2(a) (1979).

21. "Business Opportunity Plan" was defined in the Ohio Bill as follows:

"Business opportunity plan" means an agreement in which, in exchange for an initial payment greater than five hundred dollars but less than twenty-five thousand dollars to a seller or affiliated person:

(1) A purchaser obtains the right to offer, sell, or distribute goods or services:

(a) Which are identified by the trademark, service mark, trade name, advertising, or other commercial symbol of a seller; or which are required to meet the quality standards of a seller and the purchaser operates under a name using the trademark, service mark, trade name, advertising, or other commercial symbol designating a seller;

(b) In connection with which, the seller exerts or has authority to exert a significant degree of control over the purchaser's method of operation including, but not limited to, the purchaser's business organization, promotional activities, management, marketing plan, or business affairs.

(2) A purchaser obtains the right to offer, sell, or distribute goods or services:

definition of franchise²² are labeled "product" and "package" franchises²³ by the FTC. Franchises that qualify under the second portion of the FTC definition²⁴ have been labeled "business opportunity ventures."²⁵ The Ohio

(a) which are supplied by a seller, a third person with whom the purchaser is required or advised to do business by the seller, or an affiliated person;

(b) in connection with which, a seller does any of the following:

(i) secures for the purchaser retail outlets or accounts for the goods or services;

(ii) secures for the purchaser locations or sites for vending machines, rack displays, or any other display for use in the sale or distribution of the goods or services;

(iii) provides to the purchaser the services of a person able to secure retail outlets, accounts, sites, or locations;

(iv) represents that the purchaser can earn a net profit in excess of the initial payment paid by the purchaser for participation in the business opportunity plan;

(v) represents that there is a market for the goods or services;

(vi) represents that the seller will buy back any goods made, produced, fabricated, grown, or bred by the purchaser through use of the goods or services by the seller or other person enumerated in division (D)(2)(a) of this section.

S. 37, 113th Gen. Assembly (1979).

22. 16 C.F.R. §§ 436.2(a)(1)(i), 436.2(a)(2) (1979).

23. The FTC describes "product" and "package" franchises in the Statement of Basis and Purpose, *supra* note 14, at 59,700-06, in the Proposed Guides, *supra* note 15, at 59,734-35, and in the Final Guides, *supra* note 15, at 49,966-68. The FTC has indicated that these types of franchises are identified by three characteristics: "(i) distribution of goods or services associated with the franchisor's trademark, (ii) significant control of or significant assistance to, the franchisee's method of operation, and (iii) required payments by the franchisee to the franchisor." Final Guides, *supra* note 15, at 49,960. See Statement of Basis and Purpose, *supra* note 14, at 59,700.

The FTC has stated that "in 'package' . . . franchising, the franchisee is authorized by the franchisor to operate a business conforming to a format established by the franchisor and identified by the franchisor's trademark." Proposed Guides, *supra* note 15, at 59,734. The FTC also states that:

Examples of goods and services distributed through "package" franchises, include fast food (hamburger, fried chicken, etc.), car products or services (car washes, transmission centers, rustproofing services, etc.), convenience foods, car and truck rentals, beauty salons, business aids and services (tax preparation services, accounting services, etc.), campgrounds, equipment rentals, employment services, motels, hotels, and copying centers.

Proposed Guides, *supra* note 15, at 59,734. See Final Guides, *supra* note 15.

The FTC has characterized "product" franchising as a relationship in which "the franchisor produces the goods or services that bear its trademark and which are distributed through dealers who are selected on a selective or exclusive basis." Proposed Guides, *supra* note 15, at 59,734. "[E]xamples of 'product' franchises are automobile dealerships and gasoline service stations. The franchised dealers are distributing the producer's finished goods and are substantially identified in the public mind with the franchisor's trademark." *Id.* at 59,735.

24. 16 C.F.R. §§ 436.2 (a)(1)(ii), 436.2(a)(2) (1979).

25. The FTC describes "business opportunity ventures" in the Statement of Basis and Purpose, *supra* note 14, at 59,706; in the Proposed Guides, *supra* note 15, at 59,735; and in the Final Guides, *supra* note 15, at 49,968. This type of "franchise" is also ranked by three qualifying elements:

(1) The franchisee sells goods or services supplied by the franchisor or its affiliate or by suppliers with which it is required to do business;

(2) The franchisor secures retail outlets or accounts for the goods or services, or secures locations for vending devices or racks or provides the services of a person to do either; and

(3) the franchisee is required to pay the franchisor or an affiliated person in order to obtain or commence the franchised business.

Final Guides, *supra* note 15, at 49,968. See Proposed Guides, *supra* note 15, at 59,735.

The FTC also states:

The rule is principally concerned with two types of "business opportunity ventures." The first involves the selling or offering of certain kinds of distributorships. In these distributorships, the franchisor does not own the trademark or produce the goods to be sold, but rather represents that he will put the franchisee into a business of distributing certain goods or services, usually those of a well-known third party. For example, the relationship may involve the distribution of Kodak film although the person offering the business opportunity has no relationship with Kodak other than that of an ordinary buyer. . . .

The second type of business opportunity scheme covered by the rule includes certain

Act's definition of business opportunity plan is comparable to this second portion of the FTC Rule's definition of franchise, the business opportunity venture portion. There is no provision of the Act that corresponds to the product/package portion of the Rule's definition of franchise. The FTC intended that the product/package portion of the definition of franchise be exclusive of the business opportunity venture portion. This intent was demonstrated in the redrafting of a definition of franchise from the Revised Proposed Rule for the final draft of the Rule to "set out a separate portion of the definition to capture business opportunity franchises only."²⁶

In light of this pronounced FTC intention and the relationship between the Rule and the Ohio Act, one must ask if the Ohio Legislature eliminated product and package franchises from its definition of business opportunity plan. If the legislature did so, then it has excluded the most common franchises from the scope of the Ohio Act.²⁷

3. *The Significance of Similar Terminology and Legislative History*

The mere use of the term business opportunity plan in the Act is no indication that the legislature intended to limit its coverage to the FTC's concept of business opportunity venture. There is little doubt that the Ohio Legislature borrowed the term business opportunity from the FTC.²⁸ Nevertheless, the legislative history of the Act indicates that the legislature placed little significance on its choice of terms. When the Ohio Bill was introduced, its definition of business opportunity plan was very similar to the definition of franchise in the FTC Rule.²⁹ In other words, the Bill treated business opportunity plan as essentially synonymous with franchise. If the Ohio Legislature intended to restrict the coverage of the Ohio Act to the FTC's business opportunity ventures, it did so by altering the definition of the controlling term, rather than by choosing a term that was itself limiting.

The legislative history of the Act tends to support the conclusion that the scope of the Act is more limited than the scope of the FTC Rule. As indicated, the Bill was introduced in the Ohio Senate with a definition of

types of rack-jobbing opportunities and vending machine routes. As in the business opportunity distributorship, the franchisor does not own the trademark or produce the goods which the franchisee distributes.

Proposed Guides, *supra* note 15, at 59,734. See Final Guides, *supra* note 15, at 49,968.

26. Statement of Basis and Purpose, *supra* note 15, at 59,706 n.75.

27. OHIO LEGISLATIVE SERV. COMM'N, *supra* note 5, Table C, shows the number of franchised units by the major product emphasized. The source for the table was U. OZANNE AND S. HUNT, *THE ECONOMIC EFFECTS OF FRANCHISING* (1971). Twenty-one of the top twenty-two listed items would, in all likelihood, be marketed in a way that would qualify as either a product or package franchise.

28. North Carolina has enacted a statute regulating "Business Opportunity Sales." N.C. GEN. STAT. §§ 66-94-66-100 (1978). Although this statute is similar in some respects to the Ohio statute, the similarities and relationship between the FTC Rule and the Ohio Act indicate that the Rule was the source of the Act's terminology.

29. See notes 20 and 21 *supra*.

business opportunity plan that paralleled the Rule's definition of franchise.³⁰ The Bill was assigned to the Senate Judiciary Committee, which reported out a substitute bill with the revised definition of business opportunity plan that is now part of the Act. If the legislature intended for the Act and the Rule to have identical coverage, it could have made its intention clear by leaving the Bill's definition intact. Instead, the legislature, through the Senate Judiciary Committee, opted to alter a definition that clearly would have paralleled the Rule's definition of franchise. Its alteration is some indication that the legislature was dissatisfied with the Rule's coverage and intended that the Act have a more limited scope.

On the other hand, the Judiciary Committee may have analyzed the Bill's definition of business opportunity plan and concluded that nothing would be lost by striking the first part of its definition. If the second part of the Bill's definition (which is now the Act's definition) included all the business forms that were covered by the first part of the definition (the package/product portion of the FTC definition), then the first part would be superfluous and thus unnecessary. Because of the relationships between the Ohio Bill, the Ohio Act, and the FTC Rule,³¹ this conclusion is logical only if the FTC's package and product franchises qualify as business opportunity plans under the Ohio Act. This would indicate parallel coverage for the Act and the Rule.

4. *The Case for Parallel Coverage of the Act and Rule*

a. *A Comparison of Business Opportunity Ventures with Business Opportunity Plans*

As previously indicated, the business opportunity venture portion of the FTC Rule's definition of franchise was not designed to capture other types of franchises.³² Moreover, the Ohio Act's definition of business opportunity plan is comparable to the business opportunity venture portion of the FTC Rule's definition of franchise. Nevertheless, the definition of business opportunity plan in the Act, though similar, is not identical to the business opportunity venture portion of the Rule's definition of franchise. This difference may significantly broaden the Act's coverage to include more than the FTC's business opportunity ventures.

The definitions of both the Ohio Act and the FTC Rule have three requirements that the business operation or marketing method must meet to qualify as a business opportunity plan or business opportunity venture. Both definitions require that the goods or services sold by the franchisee be supplied by the franchisor, his affiliate, or a third party with whom the

30. See text accompanying notes 17 and 29 *supra*.

31. See text accompanying notes 22-25 *supra*.

32. See text accompanying note 26 *supra*.

franchisee is required to do business.³³ Both definitions also require that the franchisee be required to pay a fee or other payment to the franchisor as a condition of obtaining or operating the business involved.³⁴ The FTC Rule's third requirement is that the franchisor do one of the following: (1) secure retail outlets or accounts for the goods or services; (2) secure locations or sites for vending machines, rack displays, or similar sales displays; or (3) provide the franchisee with the services of a third party able to secure outlets, accounts, locations or sites.³⁵ The Ohio Act's final requirement is that the franchisor either satisfy one of the three criteria under the Rule's third requirement or represent any of the following: That the purchaser can earn a profit,³⁶ "that there is a market for the goods or services,"³⁷ or "that there is a buy-back arrangement."³⁸

In other words, while the Rule requires that the franchisor place "the franchisee into a pre-packaged business,"³⁹ the Act merely requires that the franchisor represent to the franchisee that he can make a profit, or that a market exists for the goods or services that the franchisee is buying. It is hard to imagine a business venture that does not entail a representation that the purchaser will make a profit. Likewise, a business sale of goods for other than consumption purposes usually entails a representation or understanding that a market exists for the goods. In the absence of specific disclaimers, each of these would be, at the least, impliedly represented in any transaction that might qualify as a business opportunity plan.⁴⁰ Thus, the result is that the third requirement of the Ohio Act's definition is no requirement at all. It does not exclude any transaction that meets the other two requirements. Since, under the Act, only two of the Rule's three requirements must be satisfied for a qualifying business arrangement to exist, there may be business relationships that would not qualify as a business opportunity venture under the FTC Rule's definition of franchise that would qualify as a business opportunity plan under the Ohio Act. Therefore, a business operation that failed only the third requirement of

33. 16 C.F.R. § 436.2(a)(1)(ii)(A) (1979); OHIO REV. CODE ANN. § 1334.01(D)(1) (Page Supp. 1980).

34. 16 C.F.R. § 436.2(a)(2) (1979); OHIO REV. CODE ANN. § 1334.01(D)(2) (Page Supp. 1980).

35. 16 C.F.R. § 436.2(a)(1)(ii)(B) (1979).

36. OHIO REV. CODE ANN. § 1334.01(D)(3)(c) (Page Supp. 1980). The term "profit" in the text is used as in accounting—an income in excess of costs.

37. OHIO REV. CODE ANN. § 1334.01(D)(3)(d) (Page Supp. 1980).

38. OHIO REV. CODE ANN. § 1334.01(D)(3)(e) (Page Supp. 1980).

39. Statement of Basis and Purpose, *supra* note 14 at 59,706.

40. An obvious question is whether implied representation would be sufficient to meet the requirements of OHIO REV. CODE ANN. § 1334.01(D)(3) (Page Supp. 1980). It would be a gross abuse of justice if a slick-talking or carefully practiced and schooled franchisor could escape this subsection by never expressly making the necessary representations and yet talking around the subjects, creating the impression of vast hungry markets and huge profits just waiting to be plucked. Certainly the implied representation has the same effect on the prospective franchisee as would the express representation. If anything, the implied representation could potentially be more misleading than an express, but false, representation, because the only limit on the implied representation is the imagination of the prospective franchisee.

the FTC's business opportunity venture definition would qualify as a business opportunity plan under the Ohio Act.

b. *Product Franchises as Business Opportunity Plans*

A product franchisee distributes goods manufactured by and purchased from his franchisor.⁴¹ In determining whether a business qualifies as a business opportunity plan, the initial requirement is that the goods sold by the purchaser be supplied by the seller, by a person with whom the seller requires the purchaser to do business, or by a person affiliated with the seller. In a product franchise, the franchisor sells his product to his franchisee. This will satisfy the requirement that a franchisee be supplied by his franchisor.⁴²

The only other effective requirement that the Act imposes on businesses to qualify as business opportunity plans is that the purchaser must be required to pay a fee as a condition of obtaining or operating the business. This is also a requirement to qualify as a product franchise under the FTC rule.⁴³ Therefore, product franchises under the Rule will be business opportunity plans under the Act.

The reason that product franchises do not qualify as business opportunity ventures under the FTC Rule is that most product franchisors do not meet the Rule's third requirement. Product franchisors neither secure retail outlets or accounts for the goods that they sell their franchisees, nor do they secure locations or sites for direct sales display equipment.⁴⁴ As outlined above,⁴⁵ this third requirement has no significant counterpart in the Act. Consequently, although product franchises are not usually within the business opportunity venture portion of the Rule's definition of franchise, they will be within the Ohio Act's definition of business opportunity plan.

c. *Package Franchises as Business Opportunity Plans*

Package franchises, like product franchises, usually do not qualify as business opportunity ventures under the FTC Rule because they also fail to meet the Rule's third requirement. Moreover, while there is little doubt that a product franchisor supplies his franchisee, satisfaction of this supply condition is not as readily apparent when a package franchise is involved. The basic question in this regard is *what* must be supplied by the seller for the supply condition to be satisfied.

41. See note 23 *supra*.

42. See note 33 and accompanying text *supra*. For the purposes of the Act, a seller that sells goods or services to his purchaser must be deemed to have supplied him. Commercial suppliers sell goods and services to their customers. Since the Act clearly is intended to regulate commercial relationships, any argument that "supplied" contemplates anything other than a commercial supply relationship should be rejected.

43. See note 34 and accompanying text *supra*.

44. See text accompanying note 35 *supra*.

45. See text accompanying notes 35-40 *supra*.

The Ohio Act's definition of business opportunity plan requires the seller to supply "the goods or services" sold by his purchaser. Package franchisors often sell a product that is a mixed bag of goods and services. This complicates the analysis in terms of the condition that "the goods or services" be supplied by the seller. The package franchisor usually sells a method of operation, access to trade secrets, a name, or a combination of these.⁴⁶ As a result, the final good sold by the franchisee to the ultimate consumer is differentiated from other goods or services of the same genre. It is the right to offer this differentiated product that the franchisee purchases from the franchisor. The consumer does not want to buy any good or service; only the differentiated good or service will satisfy his desire. This differentiated product may be obtained by consumers only from the franchisee, who in turn can buy the right to sell the differentiated product only from his franchisor. Under this analysis, the differentiated products that are offered by package franchisees are the goods or services required by the Ohio Act. The franchisor supplies these goods or services by selling the franchisee the differentiating characteristics. Thus, the goods or services sold by a package franchisee could be said to be supplied by the package franchisor.⁴⁷ Under this interpretation, package franchises would be business opportunity plans under the Ohio Act, even though package franchises usually do not meet the requirements of the business opportunity venture portion of the FTC Rule's definition of franchise.

5. *The Problems with Parallel Coverage of the Act and the Rule*

Whether the supply condition is satisfied in the typical package franchise is at least questionable. Unlike the situation in business opportunity ventures and product franchises, the physical good purchased from a package franchisee by the ultimate consumer is not usually

46. See note 23 *supra*.

47. An example is helpful in illustrating this point:

When a consumer purchases his lunch at McDonald's, he is buying a complete package of goods and services. From the moment he arrives on the McDonald's premises he begins to consume his "lunch," and his "lunch" is not complete until he leaves.

The consumer walks into the McDonald's and is immediately the beneficiary of the McDonald's method of operation. The layout, the neatly attired McDonald's employees, the method of service, and the menu are the first signs that he is in a McDonald's. He doesn't order a hamburger, he orders a Big Mac (if he ordered a hamburger, he would still be getting a hamburger that he perceived to be significantly different from those available elsewhere). Here the methods of operation and trade secrets blend together to give the consumer a unique product. Whether it is the method of preparation and contents (two all beef patties, lettuce, cheese, pickles, onions, and sesame seed bun) or the trade secrets (special sauce) that do it is irrelevant.

One of the biggest things McDonald's sells with its Big Mac is its name. The consumer may well have come to McDonald's rather than Wally's Burger Eatery simply because he knows what he will (or will not) get here. He has no idea what Wally will serve up. Besides this peace-of-mind factor, there is also a desire within the consumer for a Big Mac because he wants a break today and he knows he can get it at McDonald's. He knows it because they told him in repeated advertisements, in every known medium.

All these add up to a product that is available only at McDonald's. It is this unique product that the consumer wants and expects when he decides to buy his lunch at McDonald's.

physically supplied by the franchisor. Rather it is locally produced by the franchisee.⁴⁸ Thus, if the physical product is considered to the exclusion of the many differentiating characteristics that are common in package franchise goods, then the goods or services marketed by the franchisee are not supplied by the franchisor (seller). Under this approach, package franchises would not be business opportunity plans and would be excluded from the Act's coverage. This conclusion, however, represents a shallow and oversimplified understanding of products and the marketplace. Nevertheless, it is more easily reconciled with the legislative history than is the contrary position.

If the intent of the legislature was to eliminate all package and product franchises from the scope of the Ohio Act by the Act's deviation from the Rule's definition of franchise, it has definitely failed. As already demonstrated, product franchises are within the bounds of the Act's definition of business opportunity plan.⁴⁹ Only package franchises can be challenged as being outside the parameters of the definition of business opportunity plan, and a compelling argument has previously been advanced that even package franchises are within the bounds of the Act.⁵⁰

6. Initial Payment

A significant limitation on the Act's definition of business opportunity plan, other than the requirement that the goods or services must be supplied by the seller, is that the purchaser must be required to make an initial payment—in excess of \$100, but less than \$50,000—to the seller in order to begin or maintain the operation.⁵¹ Initial payment is defined to include the total amount the purchaser is obligated to pay during the time prior to and during the first six months of operation of the business opportunity plan.⁵² The initial payment does not include payments for "sales demonstration equipment and materials" that cost less than \$500, are not used in making sales, are not themselves for resale, and are sold to the purchaser at seller's cost.⁵³ "Sales demonstration equipment and

48. In terms of the example in note 47 *supra*. McDonald's, Inc., the franchisor, does not supply the physical hamburger. Many of the ingredients are purchased locally and the Big Mac is then prepared in the franchisee's kitchen.

49. See text accompanying notes 41-45 *supra*.

50. Under Ohio's rules of construction, the legislative history of a statute is only to be consulted if the statute is ambiguous. See OHIO REV. CODE ANN. § 1.49(C) (Page 1978). Consequently, since the Act is only ambiguous in regards to its treatment of "package" franchises, the legislative history discussed is only relevant to determining the legislature's intent to include "package" franchises within the definition of "business opportunity plan." See text accompanying notes 30-31 *supra*. A court that uses legislative history may also consider the "consequences of a particular construction" when interpreting an ambiguous statute. OHIO REV. CODE ANN. § 1.49(E) (Page 1978). The court must presume that the legislature intended "a just and reasonable result" in enacting a statute. OHIO REV. CODE ANN. § 1.47(C) (Page 1978). These provisions could give a court some basis for broadly interpreting the definition of "business opportunity plan" in a case in which a plaintiff had been misled by a "package" franchisor, and as a result suffered a substantial loss.

51. OHIO REV. CODE ANN. § 1334.01(D)(2) (Page Supp. 1980).

52. OHIO REV. CODE ANN. § 1334.01(G) (Page Supp. 1980).

53. *Id.*

materials" is not defined in the Act, but probably includes most advertising materials and sample products. The cost of vending machines and display racks, however, would be included in the calculation of the initial payment, because of their direct involvement in sales.

The Ohio Act's \$100 minimum initial payment is less than the minimum payment of \$500 required by the FTC Rule.⁵⁴ This means that certain small business opportunity plans are subject to the Act, even though not subject to the Rule. The \$50,000 maximum initial payment in the Act has no counterpart in the Rule. The idea behind excluding business opportunity plans that require large initial investments is that in such "transactions both parties employ lawyers and accountants to protect their interests."⁵⁵ Thus, the purchasers do not need the Act's protection.

Although this premise may be true to some degree, in this age of inflation a \$50,000 ceiling will exclude many who will have no significant degree of business acumen or professional assistance.⁵⁶ Since a franchisor who is selling a franchise that requires an initial payment greater than \$50,000 will likely have to comply with the FTC Rule and its disclosure provisions,⁵⁷ the honest seller is spared no burden by the Ohio Act's ceiling provision. On the other hand, the purchaser in such a transaction is denied the Act's remedies against a dishonest seller; quite possibly the only effective remedies available to him.⁵⁸

54. The Rule provides for an exclusion from its provisions when the payments to be made during the first six months of operation are less than \$500.00. 16 C.F.R. § 436.2(a)(3)(iii) (1979).

There is no specific provision in the Act to deal with the group of friends or business partners that pool their assets and purchase a business opportunity plan. Whether the \$50,000 ceiling amount applies to each purchaser or to the group as a whole is uncertain. The ceiling amount probably will apply to the group. "Initial payment" is defined as the amount the purchaser is obligated to pay. OHIO REV. CODE ANN. § 1334.01(G) (Page Supp. 1980). "Purchaser" is defined as "a person to whom a business opportunity plan is sold." OHIO REV. CODE ANN. § 1334.01(B)(Page Supp. 1980). "Person" is defined to include individuals, limited or general partnerships, or other business entities. OHIO REV. CODE ANN. § 1334.01(E)(Page Supp. 1980). This group would in all likelihood qualify as a partnership of some sort, and, thus, would be treated as one "purchaser." See generally Ohio's version of the Uniform Partnership Law, OHIO REV. CODE ANN. § 1775.05 (Page 1978).

A seller that sells a business opportunity plan to a group of individuals would also have to be more concerned with state and federal securities laws than would the seller selling to a single individual. For a fuller discussion of franchises and the securities laws, see Comment, *Franchising: Probable Impact of the New Federal Trade Commission Rule*, 40 OHIO ST. L.J. 387 (1979).

55. OHIO LEGISLATIVE SERV. COMM'N, *supra* note 5, at 13.

56. The FTC sets out a very good supporting case for this in its Statement of Basis and Purpose. They cite a study of fast-food franchises, which they assert range in cost from \$50,000 to \$100,000 dollars. See Statement of Basis and Purpose, *supra* note 14, at 59,623. That study revealed that 39% of the sample did not consult a lawyer prior to signing the franchise agreement. *Id.* at 59,627 n.20 (citing testimony of Professor Shelby D. Hunt). The FTC further argues that when it comes to franchise agreements, "even where prospective franchisees do obtain legal counsel, the attorney is frequently unfamiliar with the types of conditions set out in franchise agreements and therefore often unable to fully evaluate such provisions." Statement of Basis and Purpose, *supra* note 14, at 59,626-27.

The FTC also quotes Governor John Y. Brown, former president of Kentucky Fried Chicken, in testimony before a congressional subcommittee. "These small businessmen very often scrape up every dime they can borrow, beg, or steal in a lifetime of earnings, and put it all on one dream and hope of a franchise concept that very likely could have been misleading, misrepresentative and fraudulent." *Id.* at 59,626.

57. The Rule applies to "the advertising, offering, licensing, contracting, sale or other promotion in or affecting commerce, as commerce is defined in the Federal Trade Commission Act [15 U.S.C. § 44 (1976)] of any franchise." 16 C.F.R. § 436.1 (1979) (emphasis added).

58. See notes 125 and 126 and accompanying text *infra*.

B. Exemptions

The coverage of the Ohio Act is also limited by thirteen exemptions⁵⁹ and two partial exemptions.⁶⁰ In civil actions, the burden of proving an applicable exemption is upon the claimant of the exemption.⁶¹ The first four exempt matters under the Act and the four "exclusions" from the definition of franchise in the FTC Rule⁶² are nearly identical.

1. Total Exemptions

Employer-Employee. The Act does not apply to "the relationship between an employer and an employee, or among general business partners."⁶³ The Act does apply to limited partnership relationships. The FTC included these relationships within the operation of its Rule because their exclusion "would cloak the franchisor with the limited liability protection enjoyed by a 'limited partner,' while placing the effects of unfair or deceptive practices on the franchisee"⁶⁴ in the franchisee's role as a general partner.

Cooperative Associations. Two types of cooperative associations are not covered by the Rule or the Act: agricultural associations authorized by the Capper-Volstead Act⁶⁵ and retailer-owned cooperative chains.⁶⁶ The FTC noted that these cooperatives are owned by the members themselves and there was no evidence that the members needed the disclosures required by the Rule.⁶⁷ The Ohio Legislature concurred in that assessment and excluded them from the Act's requirements and prohibitions.

Certification and Testing Services. The Act excludes coverage of bona fide testing or certification services such as Underwriters Laboratory and Good Housekeeping.⁶⁸ These testing services are not involved in the distribution of goods⁶⁹ and, as such, are outside the scope of the Act.

Single Licenses. The Act does not cover the licensing of a single trademark, trade name, service mark, advertising, or other commercial symbol when the license is the only one to be granted for that symbol.⁷⁰ The FTC designed this exemption to exclude "one-on-one" licensing agreements, licenses for collateral products, and license agreements made in settlement of trademark infringement litigation.⁷¹ One-on-one licensing

59. OHIO REV. CODE ANN. § 1334.12 (Page Supp. 1980).

60. OHIO REV. CODE ANN. § 1334.13 (Page Supp. 1980).

61. OHIO REV. CODE ANN. § 1334.14 (Page Supp. 1980).

62. 16 C.F.R. § 436.2(a)(4) (1979).

63. OHIO REV. CODE ANN. § 1334.12(A) (Page Supp. 1980).

64. Statement of Basis and Purpose, *supra* note 14, at 59,709. See Proposed Guide, *supra* note 15, at 59,737.

65. 7 U.S.C. § 291 (1976).

66. OHIO REV. CODE ANN. § 1334.12(B) (Page Supp. 1980).

67. Statement of Basis and Purpose, *supra* note 14, at 59,709.

68. OHIO REV. CODE ANN. § 1334.12(C) (Page Supp. 1980).

69. See Statement of Basis and Purpose, *supra* note 14, at 59,709.

70. OHIO REV. CODE ANN. § 1334.12(D) (Page Supp. 1980).

71. Statement of Basis and Purpose, *supra* note 14, at 59,710.

is an arrangement in which there is one licensee who manufactures trademarked goods according to the licensor's specifications.⁷² " 'Collateral products' licensing is the practice of licensing a trademark which is well known in one context (*i.e.* Coca Cola) for use in another (*i.e.* clothing or decorative items embossed with the Coca Cola logo)."⁷³ The FTC states that "the exclusion is not applicable where the licensor grants more than one license."⁷⁴ There is no doubt that the Ohio Legislature intended to exclude the same things in each of these first four exemptions that the FTC did in their exclusions.

Security Transfers. The transfer of a registered security is not covered by the Act.⁷⁵

Real Estate Transfers. Sales of real estate in which either the buyer or the seller is a licensed real estate broker or salesman are exempt from the Act.⁷⁶ The exemption does not include transfers of real estate involving parties other than licensed real estate brokers and salesmen. Nevertheless, real estate sales generally do not involve the sale of goods or services. As long as real estate is being sold, there should be no business opportunity plan arising out of the transaction.

Media. Publishers, printers, and broadcasters who sell advertising space to or produce advertisements for sellers are exempt from the Act's coverage.⁷⁷ Nevertheless, they lose this exemption if they knowingly disseminate false or misleading information, or information that otherwise does not comply with the Act. They also are not exempt when they are advertising their own business opportunity plan.

Retailer Brands. Retailers who carry their own brand of products may license others to sell those products without complying with the Act.⁷⁸ The exemption is limited to those retailers who have been doing business in Ohio for at least five years and also sell the licensed product directly to the general public.⁷⁹

Sale of a Going Concern. The sale of a business that has been in full operation at its present location for at least six months prior to the sale is not covered by the Act.⁸⁰ This exemption relieves a purchaser of compliance with the Act upon the resale of his business opportunity plan operation. It would also exempt a seller that operated the business for six months before selling it to an ultimate operator. No equivalent exemption exists for a franchisor under the FTC Rule. Yet, a franchisee that sells his franchise would normally not be covered by the Rule's provisions because

72. *Id.* at 59,710 n.105.

73. *Id.* at n.106.

74. *Id.* at n.108.

75. OHIO REV. CODE ANN. § 1334.12(E) (Page Supp. 1980).

76. OHIO REV. CODE ANN. § 1334.12(F) (Page Supp. 1980).

77. OHIO REV. CODE ANN. § 1334.12(G) (Page Supp. 1980).

78. OHIO REV. CODE ANN. § 1334.12(H) (Page Supp. 1980).

79. A good example of this would be Sears licensing hardware stores to sell Craftsman tools.

80. OHIO REV. CODE ANN. § 1334.12(I) (Page Supp. 1980).

he would not have the "continuing commercial relationship"⁸¹ with his buyer that is required by the Rule for a franchise to exist. Consequently, a seller that operated a business opportunity plan for six months before sale would be exempt from the Ohio Act, but covered by the FTC Rule. The seller would be required to bear the burden of disclosure and yet the purchaser would be without the remedies provided by the Ohio Act. Again, this benefits only the dishonest seller.⁸² Nevertheless, it is unlikely that many sellers would go to this length to avoid the Act's provisions.

Sale of Goods to Retailers. The sale of goods or services to a purchaser who also offers other goods or services that are neither supplied by the seller nor "utilized with the goods" supplied by the seller is exempt from the Act.⁸³ Conversely, if the challenged goods are either supplied by the seller or used with the goods supplied by the seller, there is no exemption.⁸⁴ This should exempt retailers who carry a wide range of goods supplied by more than one manufacturer. It will also exclude many other businesses.

The Ohio Bill's corresponding exemption was for "fractional franchises," as defined in the FTC Rule.⁸⁵ A fractional franchise under the Rule is a relationship in which the "franchisee has been 'in the business represented by the franchise' for at least 2 years, and the franchised goods account for less than 20 percent of its dollar sales value. The other lines handled by the distributor are often in competition with the product line being franchised."⁸⁶ The FTC asserted that since at least 80 percent of the fractional franchisee's sales come from other sources, the fractional franchisee is not substantially dependent upon the sale of the franchised product.⁸⁷

81. 16 C.F.R. § 436.2(a) (1979).

82. See note 57 and accompanying text *supra*, and notes 125 and 126 and accompanying text *infra*.

83. OHIO REV. CODE ANN. § 1334.12(J) (Page Supp. 1980).

84. This section of the Act is potentially very confusing. The source of the confusion is the presence within the section of the negation of an inclusive disjunction. For the purpose of illustration the section may be simplified to the following:

The Ohio Act does not apply to:

The sale of goods to a purchaser who also offers other goods that are not:

(1) supplied by the seller; or
(2) utilized with the goods supplied by the seller.

The question here is what effect the combined use of the "not" before the colon and the "or" after the semicolon have on the two clauses: "(1) supplied by the seller" and "(2) utilized with the goods supplied by the seller." If the clauses are reduced to "A" and "B" respectively, the significant portion of the simplified section is as follows:

not: A; or B.

The question at this point is whether "not" notifies "A or B" or just "A." If all punctuation were ignored the phrase would read "not A or B." Since there is punctuation, the reasonable way to read the above phrase is "not: A or B," dropping the semicolon as unnecessary. This indicates that the proper interpretation of the statute is that "not" modifies "A or B." Consequently, an exemption is available only if the other good is neither supplied by the seller nor utilized with goods supplied by the seller.

85. S. 37, 113th Gen. Assembly § 1334.12(J) (1979).

86. Statement of Basis and Purpose, *supra* note 14, at 59,706-07. For the definition of "fractional franchise" see, 16 C.F.R. § 436.2(h) (1979).

87. Statement of Basis and Purpose, *supra* note 14, at 59,707.

This narrow exemption was significantly expanded when the Ohio Legislature revised it. A transaction is now exempt from compliance with the Act if the purchaser offers any goods supplied by someone other than his seller that are not used with the goods supplied by his seller. This is without regard to the purchaser's dependence upon the franchised product, the control that the seller has over his purchaser, or the significance of the other good in the purchaser's business. Consequently, the sale of an otherwise covered gas station would apparently become exempt if the purchaser also sold candy, gum, or cigarettes supplied by someone other than his seller. This obviously has great potential for abuse and could be a means for significant evasion of the Act.

Leased Departments. One of the Act's exclusions exempts franchise arrangements commonly referred to as "leased departments."⁸⁸ This exemption from the Ohio Act has a counterpart in the FTC Rule.⁸⁹ Typically, a leased department is an arrangement in which an independent retailer leases space from a larger retailer to sell his goods or services in the larger retailer's store.⁹⁰ The FTC asserts that "the record demonstrates that such arrangements need not be protected by the rule. . . ."⁹¹ The Ohio Legislature adopted this conclusion.

Large, Established Sellers. Large, well-established sellers are not covered by the Ohio Act.⁹² Although the FTC Rule has no similar exemption, many states have at least partial exemptions for large sellers. Although complete exemptions along the lines of that granted by the Act are rare,⁹³ many state franchise disclosure laws permit large, well-established franchisors to make fewer, less detailed, disclosures than franchisors in general.⁹⁴

The seller is deemed to be large when it meets either of two standards. The seller may have a net worth on a consolidated basis in excess of \$5,000,000 or the seller may be at least eighty percent owned by a corporation with a net worth of \$5,000,000 and may have a net worth of its own in excess of \$1,000,000. The large seller must also qualify as a well-established seller. The well-established condition requires that in the five-year period immediately preceding the sale, the seller must have been personally operating the business that is the subject of the business opportunity plan or have had at least twenty-five purchasers operating business opportunity plans. The basis of this exemption is that large, well-

88. OHIO REV. CODE ANN. § 1334.12(K) (Page Supp. 1980).

89. 16 C.F.R. § 436.2(a)(3)(ii) (1979).

90. Statement of Basis and Purpose, *supra* note 14, at 59,707.

91. *Id.* at 59,708.

92. OHIO REV. CODE ANN. § 1334.12(L) (Page Supp. 1980).

93. North Dakota has a similar exemption from its "Franchise Investment Law." N.D. CENT. CODE § 51-19-04 (Supp. 1979).

94. See, CAL. CORP. CODE § 31101 (West 1977); HAWAII REV. STAT. § 482E-4 (1976); IND. CODE ANN. § 23-2-2.5-3 (Burns Supp. 1979); R.I. GEN. LAWS § 19-28-4 (Supp. 1979); WASH. REV. CODE ANN. § 19.100.030 (1978); and WIS. STAT. ANN. § 553.22 (West Supp. 1979).

established sellers are not likely to defraud or otherwise mislead potential business associates that will be purchasers of a business opportunity plan. This premise—like that upon which the maximum initial payment exemption is based—is susceptible to criticism that it leaves without a remedy one who purchases from a large, well-established seller. Notwithstanding this exemption from the Ohio Act, these large sellers still must comply with the FTC Rule's disclosure requirements.⁹⁵ Hence, the exemption does not ease the honest seller's burden, and yet the rare dishonest seller would be shielded from the Act's remedies.

Sales to Previous Purchasers. The sale of a business opportunity plan to a purchaser that has successfully operated a similar business opportunity plan is not covered by the Act.⁹⁶ A sale to either of two types of purchasers will be exempt under this provision. First, a purchaser that has been in operation for six months, buying goods sold under the same trademark or which were produced by the seller, and that has received on resale an amount at least equal to his initial payment, is exempt from the Act. Second, a purchaser that has previously sold the goods that "are the subject of the business opportunity plan"⁹⁷ for at least one year and has earned a gross income of at least \$25,000 also is exempt from the Act. The seller would be offering the first type of purchaser the rights to sell the very same goods with which the purchaser had been previously involved. The second purchaser is buying the rights to sell a good that is similar, but not identical, to the good he previously sold. In both cases, the purchasers will have a certain degree of familiarity with the business.

Nevertheless, the second type of purchaser needs more protection from the seller than does the first. The second type of purchaser will have a greater need for the information in the disclosure statement simply because he will never have previously dealt with the particular seller or the good involved. The second type of purchaser will also lack the information to which the first type of purchaser will have access through the disclosure statement given him at the time he purchased his previous business opportunity plan. The second type of purchaser will also have less experience with the particular good being sold and the business of selling it. To compensate for this specific weakness, the Act requires that the second type of purchaser demonstrate a greater proclivity for the operation of business opportunity plans in order for the exemption to be available to his seller. A reasonable measure of the second purchaser's inclination to success is his past performance as measured by his gross income production. Thus, the legislature has recognized a difference between the two types of purchasers and adequately has dealt with the distinction.

95. See note 57 and accompanying text *supra*.

96. OHIO REV. CODE ANN. § 1334.12(M) (Page Supp. 1980).

97. *Id.*

This previous purchaser's exemption is subject to the same objection that has been previously noted. The scope of the FTC Rule is so broad that the seller/franchisor is nevertheless required to give a disclosure statement to the prospective purchaser/franchisee. Since this is the only significant burden that the Ohio Act places on an honest seller, it is foolish to protect the dishonest seller/franchisor by denying the purchaser/franchisee the remedies afforded by the Act.⁹⁸

2. *Partial Exemptions*

The Ohio Act provides two partial exemptions for situations in which the seller has made a full disclosure to his purchaser by another approved method. The Act partially exempts sales by sellers who have fully complied with the FTC Rule. The Act also grants a partial exemption to sellers who deliver a document ten days before the execution of an agreement that fully complies with the "Uniform Franchise Offering Circular" (UFOC) and the companion guidelines adopted by the Midwest Securities Commissioners Association.⁹⁹

The Rule applies to all franchises offered or sold in, or *affecting* "commerce," as defined in the Federal Trade Commission Act.¹⁰⁰ The FTC states that "[w]hile the Commission believes that most if not all franchisors and franchise brokers engage in business activities which are actually 'in commerce,' this language change is intended to make clear that the duties imposed by the Rule apply to all franchisors and franchise brokers within the Commission's jurisdiction."¹⁰¹ The scope of the Rule is so broad that it is likely that any franchisor who gives a disclosure statement will attempt to comply with the Rule. The FTC indicates that full compliance with the UFOC will satisfy the Rule's requirements.¹⁰² The UFOC, however, requires even greater disclosure than does the FTC Rule, and thus will not be the preferred means of compliance for many sellers.

The effect of this partial exemption is to make irrelevant the Ohio Act's disclosure provisions. Except for the portion of the Act to which this exemption does not apply, the only instance in which the Act will have any effect on a franchise or business opportunity plan transaction will be when the seller/franchisor has failed to comply fully with the FTC Rule.

The portions of the Ohio Act that are not covered by this exemption are those that require that a bond or trust account be established in favor of the state for the benefit of any purchaser harmed by a seller's breach of a "buy-back" arrangement.¹⁰³ A buy-back arrangement is an agreement

98. See note 57 and accompanying text *supra*.

99. OHIO REV. CODE ANN. § 1334.13 (Page Supp. 1980). The "Uniform Franchise Offering Circular" requirements are reproduced as Appendix A to the Statement of Basis and Purpose, *supra* note 14, at 59,723.

100. See note 57 *supra*.

101. Statement of Basis and Purpose, *supra* note 14, at 59,639.

102. *Id.* at 59,722.

103. Compliance with the Rule provides an exemption from the Act "[e]xcept for division (H) of Section 1334.03 and 1334.04." OHIO REV. CODE ANN. § 1334.13 (Page Supp. 1980).

made by the seller that he will (1) refund the "initial" payment upon non-renewal or termination of the business opportunity plan, or (2) purchase any goods that the purchaser produces utilizing the goods or services supplied by the seller.¹⁰⁴ Thus, any seller of a business opportunity plan, which is exempt only because of the seller's compliance with the Rule, and which represents that his purchaser's initial investment is secured in any way, must comply with the Ohio bond or trust account provisions. Failure to comply with these provisions, even in the absence of injury to a particular purchaser, will give a purchaser access to the remedies available under the Act.¹⁰⁵

III. PURCHASER RECOURSE UNDER THE ACT

When a seller fails in his attempt to secure a partial exemption from the Ohio Act by complying with the FTC Rule, he will certainly have failed to comply with the Act.¹⁰⁶ The resulting violations of the Act will allow the purchaser to cancel the sale of the business opportunity plan and sue for additional remedies.¹⁰⁷

A. Cancellation Rights

The Act provides a purchaser with an absolute right to cancel any agreement relating to the sale or lease of a business opportunity plan.¹⁰⁸ Such cancellation, however, must be within five business days of the signing of the agreement. The purpose of this cooling-off period is to allow a purchaser the opportunity to consult with others about and examine thoroughly all aspects of the business opportunity plan, in the absence of the high pressure sales tactics often employed by sellers.¹⁰⁹ The FTC included a cooling-off period in the Original Proposed Rule but deleted it from the Revised Proposed Rule and the final Rule.¹¹⁰ Considering the

104. *Id.* "Buy-back arrangement" is defined at OHIO REV. CODE ANN. § 1334.01(I) (Page Supp. 1980).

105. OHIO REV. CODE ANN. § 1334.09 (Page Supp. 1980). See notes 118-25 and accompanying text *infra*.

106. Compliance with the Ohio Act is impossible without tailoring the entire transaction to its provisions. The Act requires specific language in the disclosure statement and the agreement. OHIO REV. CODE ANN. §§ 1334.02, 1334.03, 1334.06 (Page Supp. 1980). The disclosure under the Ohio Act, although generally less extensive than under the FTC Rule, are different than those required by the Rule. See OHIO REV. CODE ANN. § 1334.02 (Page Supp. 1980). There are a number of actions that are prohibited under the Act, which are not mentioned, and therefore permissible under the Rule. See OHIO REV. CODE ANN. § 1334.03 (Page Supp. 1980). The Act also regulates the form of the agreement; the Rule does not. See OHIO REV. CODE ANN. § 1334.06 (Page Supp. 1980).

107. The Attorney General is also given the power to investigate (either on his own initiative or on the basis of complaints) potential violations of the Act. OHIO REV. CODE ANN. § 1334.07 (Page Supp. 1980). If he believes he has found a violation of the Act, he may (1) bring suit to obtain a declaratory judgment that the Act has been violated, (2) bring suit to obtain a temporary restraining order, or (3) bring a class action on behalf of the damaged purchasers. The Attorney General may also request, and the court may impose, a civil penalty of \$5000.00 for each violation, not to exceed in the aggregate \$100,000.00. OHIO REV. CODE ANN. § 1334.08 (Page Supp. 1980).

108. OHIO REV. CODE ANN. § 1334.05 (Page Supp. 1980).

109. See Statement of Basis and Purpose, *supra* note 14, at 59,712.

110. *Id.* at 59,712 n.130.

strong arguments that a cooling-off period was "burdensome and unworkable" in the context of franchise sales,¹¹¹ the FTC "determined that advance disclosure which gives the prospective franchisee at least 10 business days to consider his decision is a superior approach which will afford prospective franchisees the protection they need."¹¹² The Ohio Legislature shunned this approach and included a cooling-off period. Additionally, the Ohio Act requires that the disclosure statement be given to the purchaser ten business days in advance of the execution of the sales agreement. Thus, under the Act, a purchaser of a business opportunity plan is effectively given three weeks to examine the proposal and decide whether or not the plan is advantageous to him.¹¹³ Yet, for those sellers who have relied upon compliance with the Rule in order to secure an exemption from the Act's cooling-off provision, their failure to comply with the Rule will result in a cancellation period that stretches far beyond five business days after execution of the agreement.

The Act requires a seller to take certain specific steps to notify the purchaser of his right to cancel the agreement. The sales agreement must include a legend, in close proximity to the space reserved for the purchaser's signature, that will notify the purchaser, in brief, of his cancellation right.¹¹⁴ The seller must also attach to the agreement an "easily detachable" completed form captioned "NOTICE OF CANCELLATION" that outlines fully, in specified language, the purchaser's obligations upon cancellation, the acceptable methods of cancellation, and the last date on which the seller may cancel.¹¹⁵ Furthermore, the cooling-off period does not start to run until the seller has complied with these notice provisions.¹¹⁶ Most seller/franchisors will

111. *Id.* at 59,712 n.131.

112. *Id.* at 59,712-13.

113. The purchaser must have the disclosure statement for ten business days, two weeks before the agreement can be signed. After the agreement is signed, he has another five business days, one week, to cancel. The total time could be shortened a day or so by giving the disclosure statement to the prospective purchaser and executing the agreement on weekends.

114. OHIO REV. CODE ANN. § 1334.06(A)(7) (Page Supp. 1980).

115. OHIO REV. CODE ANN. § 1334.06(B), (C) (Page Supp. 1980).

116. OHIO REV. CODE ANN. § 1334.06(D) (Page Supp. 1980) provides:

Until the seller has complied with this section, the purchaser may cancel the agreement by notifying the seller by mailing delivery or telegraphing written notice to the seller of the purchaser's intention to cancel. The five-day period within which the purchaser may cancel the agreement prescribed by this section begins to run from the time the seller complies with divisions (A), (B), and (C) of this section.

Division (A) of § 1334.06 specifies that the agreement must include certain terms, of which the cancellation legend is just one. Divisions (B) and (C) are the requirements for the detachable cancellation form.

But, there is also a division (E), which requires that the agreement integrate all the material representations of the disclosure document, forbids confession of judgment provisions, requires oral notification of the cancellation right and forbids misrepresentation of the cancellation right, requires that any valid notice of cancellation be honored and that the seller refund any consideration given by the purchaser, and forbids negotiation of a purchaser's note or delivery of any goods or services during the time that a purchaser may cancel. Thus, if the seller has fully complied with divisions (A), (B), and (C) of § 1334.06 and the cooling-off period has passed, the purchaser may still have a cancellation right. The purchaser apparently will have a right of cancellation under the last sentence of division (D) if the seller has failed to comply with any portion of division (E).

prefer not to give their purchaser/franchisees a cancellation option and to avoid so doing, will rely upon the exemption provided by the Rule. As a result, neither the required legend nor the detachable cancellation form will be a part of the agreement between the purchaser/franchisee and the seller/franchisor. If, at a later date, the purchaser realizes that the seller cannot prove that the seller has fully complied with the FTC Rule, the purchaser may cancel the agreement at his discretion.¹¹⁷

B. Remedies

When a seller violates any provision of the Act, his purchaser has the right to rescind the transaction, and the purchaser, if damaged, may recover the greater of three times the amount of the actual damages or \$10,000.¹¹⁸ The purchaser may also recover a reasonable attorney's fee.¹¹⁹ This remedy is limited when a seller who has violated the Act, or failed to comply with the Rule in an attempt to secure a partial exemption, can show by a preponderance of the evidence that the violation or failure to comply "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid error."¹²⁰ Under these circumstances the purchaser may recover only his actual damages, and no attorney's fee may be awarded.

The Act also provides the purchaser with the right to assert any defense that he may have against his seller against any holder in due course of a note given in connection with the purchase of a business opportunity plan.¹²¹ These remedies provide the purchaser adequate recourse should a seller fail to comply with the Act.

In contrast, there may be no adequate remedy for the franchisee should a franchisor fail to comply with the Rule's provisions. It is clear that the FTC may pursue its administrative remedy under section 5 of the FTC Act¹²² since a violation of the Rule is "an unfair or deceptive act or practice."¹²³ As an additional remedy, the FTC has recommended that a

117. The only limit on the right to cancel in this situation is the five-year statute of limitations in OHIO REV. CODE ANN. § 1334.10 (C) (Page Supp. 1980).

118. OHIO REV. CODE ANN. § 1334.09(A) (Page Supp. 1980).

119. OHIO REV. CODE ANN. § 1334.09(B) (Page Supp. 1980).

120. OHIO REV. CODE ANN. § 1334.10(D) (Page Supp. 1980).

The Federal Truth-in-Lending Act provides a similar defense for creditors.

A creditor may not be held liable in any action brought under this section for a violation of this subchapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1640 (1976). The federal courts have interpreted this section to require more than mere good faith compliance with Truth-in-Lending provisions. Rather, the courts have said a lender must maintain procedures that are "followed time in and time out" and which are "designed to avoid and prevent the errors which might slip through procedures aimed at good faith compliance . . . [thus, requiring] an extra preventive step, a safety check or a rechecking mechanism." *Mirabel v. General Motors Acceptance Corp.* 537 F.2d 871, 878 (7th Cir. 1976). *Accord*, *Gallegos v. Stokes*, 593 F.2d 372 (10th Cir. 1979).

121. OHIO REV. CODE ANN. § 1334.11 (Page Supp. 1980).

122. 15 U.S.C. § 45 (1976).

123. 16 C.F.R. § 436.1 (1979).

private "right of action against the violator" be recognized by the courts when the Rule has been violated.¹²⁴ There is, nevertheless, substantial doubt that the courts will find a private right of action for violations of the Rule, and such a right of action could only be established after expensive litigation.¹²⁵

IV. CONCLUSIONS AND RECOMMENDATIONS

The coverage of the Ohio Business Opportunity Purchasers Protection Act is subsumed within the coverage of the FTC Rule. Thus, purchasers and sellers under the Act are, respectively, franchisees and franchisors under the Rule. Consequently, all franchisors who sell franchises in Ohio are required to give disclosure statements that comply with the Rule. When franchisors comply with the Rule, Ohio franchisees will have an adequate basis on which to evaluate the proposed transaction regardless of whether the transaction will be covered by the Act. Contrast this with the situation when a franchisor opts not to comply with the Rule, or fails in his attempt to comply with the Rule; then only franchisees who are purchasers of business opportunity plans and covered by the Act will have adequate recourse against the franchisor. Other Ohio franchisees, however, are left without a remedy.¹²⁶

This result demonstrates that the only real purpose served by the Act is to provide an adequate remedy to those who have been misled by dishonest or negligent franchisors. Yet, because of the Act's definition of business opportunity plan, which may exclude package franchises and does exclude all larger franchises, and because of the broad exemptions from the Act, many franchisees are left without a remedy while others have abundant remedies. Since all sellers are required to comply with the Rule and its disclosure provisions, the limited coverage of the Act inures solely to the benefit of dishonest or negligent franchisors. They may ignore the Act and the Rule with impunity, saving the cost of compliance, while honest sellers incur the cost of preparing adequate disclosure documents.

This disturbing result could be easily corrected. First, the definition of business opportunity plan under the Ohio Act would have to correspond to the definition of franchise under the FTC Rule. This realignment would eliminate any question of the Act's applicability to package franchises. This could be done by adopting a definition of business opportunity plan similar to the one that existed in the Bill. The \$50,000 ceiling limit on the initial payment would also have to be removed. Moreover, three

124. Statement of Basis and Purpose, *supra* note 14, at 59,723.

125. "The franchisee-plaintiff who attempts to exercise a private right of action under section 5 of the FTC Act will face significant substantive barriers." Comment, *Franchising: Probable Impact of the New Federal Trade Commission Rule*, 40 OHIO ST. L.J. 387, 395 (1979). For a fuller discussion of these barriers and other remedies that may be available to franchisees, *see id.*

126. The franchisee would still have his common law remedies, but these remedies have proved to be ineffective in the past. *See id.* at 393-94.

exemptions would have to be amended: (1) the exemption designed to exclude the sale of goods to retailers would have to be narrowed to the scope of the fractional franchise exclusion provided for in the Rule or deleted, (2) the exemption for large, established sellers would have to be deleted, and (3) the exemption for sales to previous purchasers of business opportunity plans would have to be deleted.¹²⁷

Only when the Act provides an adequate remedy for *all* Ohio franchisees will it have lived up to the promise that accompanied the Bill's introduction in the Ohio Senate.

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127. The exemption for the sale of a going concern would have to be limited to sales by purchasers to conform with the Rule's exemption of sales by franchisees, but not by franchisors. In light of the unlikely use of the going concern exemption as a means of avoiding the Act's provisions, see notes 80-82 and accompanying text *supra*, amendment of that exemption may be desirable but not necessary.

